IN THE SUPREME COURT OF FLORIDA

CASE NO. SC-15-406

LOWER TRIBUNAL No. 1991-373-D

ANTONIO LEBARON MELTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

LINDA McDERMOTT
Florida Bar No. 0102857
McCLAIN & McDERMOTT, P.A.
20301 Grande Oak Blvd.
Suite 118 - 61
Estero, FL 33928
(850) 322-2172
lindammcdermott@msn.com

Counsel for Appellant
ANTONIO LEBARON MELTON

REQUEST FOR ORAL ARGUMENT

Mr. Melton has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved. Mr. Melton requests oral argument.

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the lower court's denial of a postconviction motion after an evidentiary hearing. The following abbreviations will be utilized to cite to the record in this cause, with appropriate volume and page number(s) following the abbreviation:

"R." – Record on direct appeal to this Court;

"R2." - Record on direct appeal to the First District Court of Appeal;

"PCR." - Record on appeal after postconviction proceedings;

"T." – Transcript of postconviction evidentiary hearing;

"D-Ex." - Defense exhibits entered at the evidentiary hearing and made part of the postconviction record on appeal;

"S-Ex." - State exhibits entered at the evidentiary hearing and made part of the postconviction record on appeal;

"PCR2." - Record on appeal following the summary denial of Mr. Melton's successive postconviction motion;

"PCR3." - Record on appeal following the successive postconviction evidentiary hearing.

STATEMENT OF THE CASE

On February 5, 1991, Mr. Melton was charged by indictment for first degree murder and armed robbery with a firearm (R. 1117). After pleading not guilty to both counts of the indictment, Mr. Melton was tried before a jury. On January 30, 1992, Mr. Melton's jury returned verdicts of guilty on both counts (R. 895-96, 1275-76). Following a penalty phase, the jury recommended death by a vote of eight (8) to four (4) (R. 1112, 1285). On May 19, 1992, the trial court imposed a sentence of death for the murder and life imprisonment on the armed robbery (R. 1380-1401, 1413-22).

On direct appeal, this Court affirmed Mr. Melton's convictions and sentences. Melton v. State, 638 So. 2d 927 (Fla. 1994). Mr. Melton filed a petition for writ of certiorari in the United States Supreme Court, which was denied on October 31, 1994. Melton v. Florida, 115 S. Ct. 441 (1994).

Mr. Melton's initial Fla. R. Crim. P. 3.850 motion was filed on January 16, 1996 (PCR. 74-200). An amended motion was filed on July 5, 2001 (PCR. 907-1083). Following a Huff hearing on October 18, 2001, the lower court granted a limited evidentiary hearing on some of Mr. Melton's claims (PCR. 1191-93). On February 11, 2002, Mr. Melton amended his Rule 3.850 motion (PCR. 1365-1558). On February 13-15, 2002, the lower court held an evidentiary hearing.

On March 23, 2004, the lower court issued an order denying

relief (PCR. 1937-2018). On July 27, 2004, the lower court denied Mr. Melton's motion for rehearing (PCR. 2026-2033). Mr. Melton appealed the denial of relief to this Court and simultaneously filed a petition for writ of state habeas corpus.

On November 30, 2006, this Court affirmed the denial of postconviction relief and denied the habeas corpus petition. Melton v. State, 949 So. 2d 994 (Fla. 2007), rehearing denied February 15, 2007.

On March 9, 2009, Mr. Melton filed a successive Rule 3.851 motion alleging newly discovered evidence (PCR2. 1-26). Following a response by the State, a case management conference was held on August 6, 2009 (PCR2. 65-103). Thereafter, on September 13, 2009, the lower court entered an order denying Mr. Melton's motion without an evidentiary hearing (PCR2 107-10).

Mr. Melton appealed the denial of relief to this Court. On February 9, 2011, by Order, this Court affirmed the denial of postconviction relief. Melton v. State, Florida Supreme Court Case No. SC09-2017 (Feb. 9, 2011 Order).

On June 11, 2014, Mr. Melton filed a successive Rule 3.851 motion alleging newly discovered evidence (PCR3. 1-24). Following a response by the State, a case management conference was held on August 8, 2014 (PCR3. 55-75).

An evidentiary hearing was held on October 28, 2014 (PCR3. 98-224). Following the hearing, the parties filed written closing arguments (PCR3. 348-80, 381-421). On December 15, 2014,

the lower court denied Mr. Melton's motion (PCR3. 422-42). The court also denied Mr. Melton's timely motion for rehearing (PCR3. 449-50). Mr. Melton timely filed a notice of appeal (PCR3. 451-2).

In addition to his state court proceedings, on March 3, 2008, Mr. Melton filed a federal petition for writ of habeas corpus in the United States District Court, Northern District of Florida. On May 31, 2013, the district court issued its order denying Melton's petition for writ of habeas corpus.

Mr. Melton filed an application for certificate of appealability in the Eleventh Circuit Court of Appeals. On October 9, 2013, the Eleventh Circuit issued an order denying Mr. Melton a COA. A timely motion for reconsideration was also denied. Melton v. Sec'y, Fla. Dept. Of Corrs., 778 F.3d 1234.

Mr. Melton's petition for writ of habeas corpus to the United States Supreme Court is due on July 31, 2015.

STATEMENT OF THE FACTS

A. TRIAL PROCEEDINGS

On January 23, 1991, Bendleon "Ben" Lewis and Antonio Melton were arrested for killing pawn shop owner George Carter. They were caught leaving the pawn shop immediately after Carter was shot (R. 501-2). Lewis was apprehended with a bag filled with merchandise from the pawn shop, including several firearms (R. 508-9); Mr. Melton had a .38 caliber firearm on his person (R. 502).

At Mr. Melton's trial, both Mr. Melton and Lewis testified. However, both presented a different version of what occurred while in the pawn shop. In the State's case, Lewis testified that Mr. Melton asked him to assist him in robbing the pawn shop mid-day on January 23rd (R. 626). Lewis obtained an unloaded firearm from Phillip Parker (R. 627). Lewis and Mr. Melton met at Joseph Mims house at 5:00 p.m. where they took gloves from Mims' bathroom (R. 628-9). The two walked to the pawn shop and eventually entered (R. 632).

The rouse was that Lewis would pretend to sell his necklace so that Mr. Melton could steal some jewelry (R. 632). But, Lewis saw that Mr. Carter had a weapon in a holster and grabbed Mr. Carter's hands (R. 633). Lewis took the weapon and gave it to Mr. Melton (R. 634). Lewis began to put items into the bag and then went to the safe to take additional items (R. 634-5). Lewis

went to open the side door so that the two could leave when he heard a shot (R. 636). He did not see a scuffle before the shot (R. 637).

Significantly, Lewis admitted that while he was hoping for something from the State, there was no specific deal (R. 624-5, 645).

Mr. Melton testified that it was Lewis who contacted him on January 23, 1991 (R. 680). The two met later that day and went for a walk (R. 682). They discussed making some money so that they could buy more alcohol (R. 683). They decided to go to the pawn shop and attempt to steal some jewelry (R. 684). When they entered the store, Lewis began discussing pawning his necklace with Mr. Carter (R. 684-5). Mr. Melton attempted to take a ring when Mr. Carter saw him (R. 686). Lewis grabbed Mr. Carter's hands and Mr. Melton took the weapon that Mr. Carter had (R. 686).

Lewis began taking jewelry and other items (R. 687). Shortly thereafter, Mr. Carter rushed Mr. Melton and Mr. Melton lost his balance (R. 691). Lewis came over and punched Mr. Carter (R. 692). Mr. Carter fell and as he attempted to get up, he grabbed the firearm in Mr. Melton's hand (R. 694). A struggle ensued and the gun went off (R. 695).

In closing, the State asserted that Mr. Melton intended to kill Mr. Carter even before the two entered the pawn shop and

that there was no struggle (R. 782, 784, 810).

Also, before trial, on March 15, 1991, Lewis gave a statement to the authorities implicating Mr. Melton and a man named Tony Houston in the killing of cab driver Ricky Saylor (T. 54, 57-8, 203). Mr. Melton was subsequently tried for the murder of Saylor, and a jury found him guilty on September 13, 1991. On November 6, 1991, Mr. Melton received two life sentences for the murder and armed robbery of Saylor (R. 924).

Mr. Melton's conviction in the Saylor case did not rest on any physical evidence from the crime scene.[1] Mr. Melton's conviction was not secured through any eyewitness testimony. The only direct evidence to convict Mr. Melton of first degree murder and robbery was the testimony of co-defendant Tony Houston (R2. 396-401) and Ben Lewis, who was not charged in the murder.[2]

Subsequent to Mr. Melton's conviction in the Saylor case, the State utilized his conviction to secure a death sentence for Mr. Melton in the present proceedings, the George Carter murder. In its sentencing order, the trial court relied on two aggravating circumstances, pecuniary gain and the prior violent felony from the Saylor case (R. 1394-95).

Regarding the aggravating factor of a prior violent felony,

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[1]The only physical evidence tying anyone to the scene was a fingerprint belonging to Tony Houston found on the back seat passenger door of the cab (R2. 337).

[2]Mr. Houston pled guilty to Second Degree Murder.

the trial court found:

> 1. The defendant was previously convicted of another capital felony and of a felony involving the use or threat of violence to the person. The evidence established conclusively and beyond any reasonable doubt that the defendant was previously convicted of first degree murder and armed robbery. In that case, as in this case, the victim was killed by a shot to the head while the defendant was participating in the robbery of the victim. In both cases, the evidence established that the defendant fired the fatal shots. The violent crimes of which defendant were convicted were extremely violent and life-threatening, and resulted in the death of the victim. They were committed with no pretense of moral justification, for pecuniary gain, and with disregard to the life of the victim. **The Court gives great weight to this aggravating circumstance.**

(R. 1395)(emphasis added).

While addressing the issue of mitigating circumstances, the court gave no weight to the defense's argument of disparate treatment of co-defendants:

> 3. Lenient treatment or disparate sentences, actual and inchoate, given to co-defendants. The Court finds that no mitigating circumstance in this regard was proved by the greater weight of the evidence. Co-defendant Bendeleon Lewis has not been sentenced in this case. There can be little doubt that Bendeleon Lewis expects and will receive some degree of leniency (certainly less than a death sentence) for his cooperation, and considering the fact that the evidence conclusively establishes the defendant, and not Bendeleon Lewis, as the trigger man who committed the actual killing in this case. There are legitimate reasons for imposition of a lesser sentence on Bendeleon Lewis, and such lesser sentence would not be disparate or constitute a mitigating circumstance.
>
> Not charging or prosecuting Bendeleon Lewis in the death of Ricky Saylor is not lenient treatment and does not constitute a mitigating circumstance. The greater weight of the evidence proves that the State does not

> have sufficient valid evidence to do so; nor does failure of the State to prosecute Bendeleon Lewis for perjury. Sentencing of co-defendant Tony Houston in the prior case to twenty years imprisonment is not lenient or disparate treatment in that case, and would not be a mitigating circumstance in this case if it were. Again, in the prior case, Antonio Melton was proved to be the trigger man, not co-defendant Tony Houston, and legitimate reasons existed for differing sentences.

(R. 1397-99)(emphasis added).

B. INITIAL POSTCONVICTION PROCEEDINGS

During Mr. Melton's posconviction evidentiary hearing, multiple witnesses were presented, and numerous exhibits were introduced, with regard to claims involving ineffective assistance of counsel at the guilt and penalty phases, Brady/Giglio, and newly discovered evidence of innocence. Six individuals were called to testify regarding separate statements made to them by Ben Lewis while they were inmates in the Escambia County Jail. The first witness, David Sumler, testified that he came into contact with Lewis in 1991 (T. 420).[3] During a conversation, Lewis stated that he and Houston shot a taxi driver and that Mr. Melton wasn't there at the time (T. 420).[4] According to Sumler, Lewis was bragging in the cell, which

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[3]Sumler testified that he knew Ben Lewis, Tony Houston and Antonio Melton since they were little children in the neighborhood (T. 437).

[4]Lewis did not specifically say who shot the taxicab driver, only that Mr. Melton was not there and he and Houston were (T. 435).

contained 24 other inmates (T. 435). Everyone in the cell knew what Lewis was doing (T. 433).

Subsequently, someone from law enforcement came to see Sumler (T. 430).[5] He was asked whether Lewis had said anything about Mr. Melton being at the scene where the taxi driver got shot (T. 430). Sumler related the same information (T. 430). To his knowledge the officer who interviewed him was obtaining information to present to the courts on Mr. Melton's behalf (T. 439).

The second witness to testify regarding a statement made to him by Ben Lewis while in the Escambia County Jail was Paul Sinkfield. Sinkfield recalled that during this conversation,[6] Lewis confided in him about two robberies and murders (T. 452-53).[7] Lewis stated that he robbed and killed a cab driver with T.H. [Tony Houston] (T. 453).[8] Lewis said he himself shot the cab driver because "he was just nervous, got excited and shot him" (T. 454).

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[5]The witness did not recall who it was specifically that came to see him or how they got his name (T. 430).

[6]This conversation occurred in 1990 or 1991 (T. 451-52).

[7]Sinkfield testified that this conversation took place in a private room and that to his knowledge, no one else could hear the conversation (T. 460). However, Sinkfield was not always in the same cell with Lewis and didn't know who he was talking to when he was in the other cell (T. 476-77).

[8]Lewis mentioned that he was with Mr. Melton earlier in the day (T. 454).

Lewis also told Sinkfield about the pawn shop murder (T. 455). He said that he got into a struggle with the owner, that Mr. Melton ran over to help and that's when the gun went off and killed the victim (T. 456). During the time of this conversation, Lewis was very worried; he was facing life in prison for murder (T. 457).

On a subsequent occasion, Sinkfield saw Lewis in the holding cell (T. 458). Lewis said he was relieved, that he had spoken to his attorney, and that he was going to get a deal (T. 458).

Sinkfield knew Lewis from the streets of Pensacola (T. 450), where he was involved in selling drugs (T. 451), and Lewis was into robbing drug dealers with a pistol (T. 451).[9] Sinkfield only knew Tony Houston by his reputation, which was bad (T. 464).

Lance Byrd also came into contact with Ben Lewis in the early 1990's at the Escambia County Jail (T. 485).[10] Lewis discussed the pawnshop case and was wondering if there was any way he could get out of the murder charge (T. 486). Lewis said that his lawyer told him if he could come up with something else, he could probably get a lesser sentence (T. 487).

Lewis said he knew about the taxicab murder (T. 488), and that he was going to tell his lawyer that Mr. Melton had done it

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[9]Lewis never robbed Sinkfield or vice versa (T. 463).

[10]Byrd also knew Lewis prior to their contact in the jail (T. 485).

(T. 488, 499). Lewis didn't say who did kill the taxicab driver (T. 499), but he did admit that Mr. Melton had left and that he and Houston were still there (T. 488, 500).

Next, Alphonso McCary testified to his conversation with Lewis in the Escambia County Jail. McCary had been in a cell with Antonio Melton, during which time Mr. Melton told him that Lewis was trying to put a murder charge on him (T. 507). When McCary asked Lewis about this, Lewis said that they came to him with a deal and he was trying to protect himself (T. 507).[11] However, Lewis, who seemed to be upset about what he was doing to Mr. Melton, said that after this was all over with, he would straighten out what he had done wrong (T. 507-08). Lewis proceeded to state that Mr. Melton didn't know anything about the cab murder, but that he was trying to save himself now and it was better Antonio than him (T. 508).

The fifth witness to testify about jailhouse conversations with Ben Lewis was Bruce Crutchfield. Crutchfield was in the Escambia County Jail in early 1991 when he came into contact with Lewis. Lewis was hysterical, having a hard time coping with the reality of the situation and was in total agony (T. 592). Lewis confessed that he had shot a taxi driver and couldn't believe

[11]McCary was friends with both Lewis and Mr. Melton and had known them for many years before 1991 (T. 516-17).

what he had done (T. 592).[12] Crutchfield told him to keep his mouth shut, that if he needed to confess, he should confess to God (T. 592-93). Crutchfield remembered this conversation because "when somebody walks up to you and tells you that they done something like that and they are sitting there beating their head on the wall and they are sitting there and you're talking to them, you don't forget it." (T. 622).

The final witness to testify about a jailhouse confession by Lewis was Fred Harris. Harris was in the Escambia County Jail in 1990 and 1991 (T. 632-33). Lewis, who was a friend of his (T. 633), told him that in the pawn shop case, he, Mr. Melton and the victim were wrestling, the gun went off, and the owner was shot (T. 635).

Lewis was scared and needed some advice from Harris (T. 636). In response, Harris told him that he needed to do what he had to in order to save himself (T. 636). Lewis responded that he was going to state that Mr. Melton was the triggerman in the pawn shop case (T. 636).[13] According to Harris, this conversation was private (T. 647).[14]

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[12]Lewis said he was by himself when he killed the cab driver (T. 593).

[13]Lewis stated that the pawn shop owner was holding the gun when it went off (T. 647).

[14]Also, Lewis never spoke to the witness about the taxicab murder (T. 638).

With regard to the aforementioned witnesses, trial counsel Terry Terrell testified that if he had testimony from an inmate that Lewis stated that he, Carter and Mr. Melton were all struggling when the gun discharged, he would have presented this testimony (T. 172). This would have given him something to present that would reduce culpability (T. 172).

Terrell did not send an investigator to the Escambia County Jail to interview the cellmates of Ben Lewis (T. 713). Terrell testified that he did not have any strategic reason for not doing this (T. 182-83). He did not recall doing any independent investigative requests in this case (T. 712). Terrell had snitch cases before and these kinds of inquiries had been uniformly unproductive (T. 713). That is the only reason he could think of that he would not have done it (T. 713). After reviewing everything, Terrell concluded that he should have given it a try (T. 713-14); he should have interviewed friends of Lewis (T. 244).

According to Terrell, Mr. Melton absolutely denied involvement in the Saylor murder case (T. 156-57). He never wavered on this (T. 156).[15] In the Carter case, Terrell recalled that the only two aggravating circumstances were the prior crime of violence, which was Saylor's homicide, and the felony was

[15]Mr. Melton did not deny his involvement in the Carter case (T. 156).

committed for the purpose of pecuniary gain (T. 157). If the State only proved pecuniary gain, it would have been highly unlikely if not nonexistent that Mr. Melton would be eligible for the death penalty (T. 158).

In addition to the aforementioned testimony, a significant portion of the postconviction evidentiary hearing focused on various exhibits introduced into evidence. D-Ex. 1 is a letter to Terrell from Joseph Schiller dated August 9, 1991, and copied to John Spencer and Sam Hall (PCR. 1694-95).[16] The letter states:

> In order to reach a settlement on this case, I would like to propose the following disposition of the taxicab murder case:
>
> Melton would plead guilty to the armed robbery and first degree murder charge on the taxicab case. The State would not seek the death penalty and make a binding recommendation of life. The Court would adjudicate him guilty of the armed robbery and sentence Melton to 25 years on that count. The Court would withhold adjudication of guilt on the murder count and pass it until October for sentencing, or after the disposition and sentencing of the Carter case.
>
> We would then try the Carter case and if it gets to the penalty phase, we could only introduce the prior armed robbery conviction. There would be no mention of the other count nor could the Court consider the taxicab murder case in sentencing because Melton still would not be adjudicated at that time of the murder.
>
> You, likewise, if it gets that far in the Carter case, could argue to the jury in the penalty phase as

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[16]Schiller was the primary prosecutor in the Saylor case (T. 140). Spencer was the primary prosecutor in the Carter case (T. 140). Sam Hall tried the Saylor case with Terrell (T. 190).

> you have done so eloquently in the past, that your client already has 25 years and a life recommendation will ensure that he serves at least 50 years and there is no possible way he could be a threat to society again, etc.etc.
>
> Although I haven't cleared this with the victim's family in the taxicab case, I believe they would be in agreement because it gives the State some additional evidence in aggravation in the Carter case. If your client is agreeable to this proposition, let me know and I will discuss it with them.

While Schiller was not sure if he ever sent the letter (T. 109), Terrell recalls receiving a copy of it (T. 193). Terrell stated that Mr. Melton did not accept the offer (T. 193).

D-Ex. 2 is a subpoena to Ben Lewis to appear before Mike Patterson and John Spencer at the State Attorney's Office to testify (PCR. 1696).[17] Schiller testified that it is a Joe Doe subpoena and it doesn't state which case it is related to (T. 109-10).[18] According to Schiller, this is a state attorney subpoena and it is standard procedure, particularly if in an investigation, "they don't want other people to see the subpoena and know he's coming down to testify about a certain defendant, or if he's in jail with that same person." (T. 112-13). Schiller didn't know if part of the intent would be to make sure that Terrell didn't know about the interview of Mr. Melton's co-defendant during the pendency of Mr. Melton's capital case (T.

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[17]Patterson was an assistant state attorney.

[18]Schiller didn't know if he was present for the interview (T. 110).

113).[19]

As to D-Ex. 2, Terrell saw this for the first time about eight days prior to his evidentiary hearing testimony (T. 203). He was not aware that Lewis had been issued a state attorney subpoena under a false name (T. 204).[20] Terrell would not have been able to find this subpoena in the clerk's office (T. 204). Terrell arguably would have used this to show that Lewis expected to receive a benefit for his testimony (T. 205).

Terrell did recall that Lewis had been talking, but he didn't recall if he specifically knew about the interview with Patterson (T. 238). Terrell was later shown D-Ex. 13, which is a supplemental offense report by Officer Tom O'Neal[21] (T. 689, PCR. 1731-34).[22] It states that Ben Lewis was issued a subpoena to give information in the case (T. 690). It has other language about the Carter case and Lewis making statements (T 690). However, there is nothing in there to give Terrell a lead as to whether or not Lewis approached the State to provide information to give favorable treatment (T. 691). Terrell testified as

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[19]Spencer testified that he did not have an independent recollection of what occurred pursuant to the subpoena (T. 359).

[20]Mr. Melton had been charged with capital murder at the time of the subpoena (T. 204).

[21]Officer O'Neal was a deputy sheriff in Escambia County in 1990 (T. 45). He was assigned to the homicide investigation of Ricky Saylor (T. 46).

[22]Terrell had this report in his file (T. 689).

follows:

> Q. Now, on cross-examination of Mr. Schiller, within the confines of one of his questions, he indicated that you knew that Mr. Lewis had given a statement, had been subpoenaed to the State Attorney's Office and had given a statement, and that you did know that, at some point you came to know that?
>
> A. Yes.
>
> Q. Now, is there a categorical difference between Mr. Lewis being subpoenaed and forced to provide information or Mr. Lewis volunteering the information in an attempt to get favorable treatment? How would that have affected your strategy?
>
> A. Significantly different argument.
>
> Q. And if you would have known –
>
> A. And facts.
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> Q. Different facts. If you would have known that Mr. Lewis, in fact, approached the State with information, would you have argued that to the jury?
>
> A. Yes.

(T. 735-36).

D-Ex. 3 is a handwritten numbered list of things to do (PCR. 1697). Schiller identified the handwriting as his (T. 115). He stated that these were notes to remind himself to do certain things on the Saylor case (T. 115). There are checkmarks in the margins by some of the numbers (T. 115, PCR. 1697). Schiller testified that he had no idea as to why he checked them (T. 115).

On the list of things to do, one of the items is to locate Summerlin (T. 114). Schiller testified that he had never spoken

to Summerlin, and that he first learned of Summerlin during the deposition when O'Neal testified (T. 115-16). Schiller had no knowledge that the man's name was actually Sumler, and he had no knowledge of David Sumler prior to the Saylor trial (T. 116-18).[23] If the witness had knowledge that Lewis told Sumler that Houston had shot the taxicab driver, he would have turned this information over to Terrell (T. 118). According to Schiller, Summerlin was not a c.i. (T. 117). He was just an inmate that O'Neal got wind of somehow (T. 117).

D-Ex. 4 is a waiver of speedy trial by Tony Houston, signed on August 28, 1991 (PCR. 1698). Schiller affixed his signature to this waiver of speedy trial (T. 129). He acknowledged that this had to do with Houston testifying against Mr. Melton in the taxicab case (T. 130). Schiller needed Houston to waive speedy trial in order for him to provide testimony against Mr. Melton in the Saylor case (T. 130). At the time, the State was in negotiations with Houston to agree to a plea (T. 131). Houston rejected the offer of 10-25 years (T. 131-32). Yet, Houston decided to testify against Mr. Melton without a plea (T. 131-32). After he testified, Houston signed the plea agreement (T. 132).

Terrell noted that D-Ex. 4 was executed just a couple of weeks before the Saylor trial (T. 200). He testified that it is

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[23]Spencer also testified that he had no recollection of having spoken with David Sumler or Summerlin (T. 364).

somewhat unusual for a prosecutor to affix his signature to that form (T. 200). He had never seen it done before (T. 200-01). Terrell testified that it might support the theory that Houston expected a benefit for providing his testimony against Mr. Melton in the Saylor case (T. 201). Terrell acknowledged that the document was available in the court file (T. 252). He testified that he should have presented this to the jury and didn't recall a strategic reason for not doing so (T. 201-2).

D-Ex. 5 is a written plea agreement (PCR. 1699-1701). The agreement was executed by Houston on October 9, 1991 (PCR. 1701). The agreement was typed on August 28th, the same day that Houston waived his speedy trial rights (T. 134, PCR. 1701). It appears that Terrell had an unexecuted copy at the time of the trial in the Saylor case (T. 207).

D-Ex. 9 is the same plea agreement (PCR. 1710-12), with a few exceptions. Spencer testified that it appeared to be his signature at the bottom of page two of the agreement, with the date of November 13th handwritten over the date of August of 1991 (T. 349).[24] There are three other signature blocks, but they are not signed (T. 350). Spencer explained the discrepancy by stating he signed D-Ex. 9 as a memento as to when the sentencing actually took place (T. 351). According to Spencer, it has no significance whatsoever (T. 352). It was signed the same day as

[24]Houston was sentenced November 13, 1991 (T. 350).

D-Ex. 5 (T. 352).

Spencer did not know if the waiver of speedy trial was part of the consideration for the plea agreement (T. 354). Schiller was lead counsel and the witness was not privy to all of the conversations between Schiller, Houston and Houston's attorney (T. 354). Yet, Spencer signed the plea agreement (T. 356).

D-Ex. 6 are notes by Terrell regarding the deposition of Bruce Frazier (T. 160, PCR. 1702-05). The notes reflect that Frazier was reporting to Don West that Lewis was in his cell talking (T. 160). Terrell didn't ask for the deposition, which was taken on the eve of trial, to be transcribed because he didn't think it would be fruitful (T. 221).

D-Ex. 7 is a Florida Department of Corrections post-sentence investigation report of Ben Lewis, dated July 21, 1992 (T. 177-78; PCR. 1706-08). The relevant portion of D-Ex. 7 states, "After Mr. Carter opened the safe he apparently began struggling with Melton. Melton and Lewis then struck the victim, knocking him to the floor." (PCR. 1706).

Terrell saw this document for the first time the day before his testimony (T. 177). This report, which would have been produced after the completion of Terrell's representation of Mr. Melton (T. 179), arguably would have been corroborative of witnesses' testimony who indicated that Lewis said that he, Mr. Melton and the victim were involved in a struggle (T. 179). It

also arguably would have corroborated Mr. Melton's statement that he gave to law enforcement when he was first arrested (T. 179).

D-Ex. 10 is a billing statement by attorney Jim Jenkins that was provided to the county for his representation of Ben Lewis in the Carter case (T. 292, PCR. 1713-24). Jenkins testified he first saw Lewis at the jail after he was appointed (T. 283).[25] He thought the evidence was overwhelming and believed that the next time he saw Lewis, he suggested he cooperate (T. 283).

Jenkins testified that he approached the State about Lewis' cooperation and any benefit he might receive (T. 285). His bill reflects a February 14, 1991, phone conference with the State Attorney's Office (PCR. 1713). Jenkins proceeded to tell Lewis that his cooperation in this case alone would probably not be sufficient, but that if he had any information on any other crimes, he might want to come forward (T. 285-86). Jenkins testified that these events occurred early in his representation of Lewis (T. 286).

The next time Jenkins saw Lewis at the jail, probably a week or two later, Lewis had information about Mr. Melton regarding the Saylor homicide (T. 286-87). Jenkins told Lewis that if the information rose to a sufficient level, it might work out for something less than a life sentence (T. 290). Jenkins believes he gave this information to either Schiller or Spencer (T. 289).

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[25]Lewis was arrested on January 23, 1991 (T. 292).

The State told Jenkins that his client's cooperation would be considered in resolving his case but there was no agreement (T. 291, 303).[26]

Jenkins' bill reflects the following contact with the State prior to Lewis' interview on March 15, 1991, pursuant to the John Doe subpoena: On February 14, 1991, a phone conference with the State Attorney's Office for fifteen minutes; on February 25, 1991, phone calls to Tom O'Neal, Mike Patterson and John Spencer, for a total of forty five minutes; on February 26, 1991, a phone call to Mike Patterson and a phone call from Tom O'Neal for a total of thirty minutes; on February 27, 1991, a phone call to Tom O'Neal for 15 minutes; on February 28, 1991, a phone conference with Mike Patterson and a phone call to Tom O'Neal for a total of fifteen minutes; on March 1, 1991, phone conferences with Mike Patterson, John Spencer and Tom O'Neal for a total of one hour and thirty minutes; on March 5, 1991, phone calls to John Spencer and Tom O'Neal, and a phone call from Tom O'Neal for a total of thirty minutes; on March 6, 1991, a phone call to John Spencer and a meeting with John Spencer for a total of thirty minutes; on March 12, 1991, a phone call from Tom O'Neal for six minutes; on March 14, 1991, a phone call from Tom O'Neal for less

[26]Jenkins was hoping for a reduction to second degree murder (T. 291).

than twelve minutes (PCR. 1713-15).[27]

Terrell called Jenkins to testify during the penalty phase of the Carter case (T. 172). Terrell wanted to bring to the jury's attention the benefit for Lewis to place responsibility solely on Mr. Melton and to argue proportionality (T. 172). It would have been helpful to present the information that Jenkins had suggested to Lewis (T. 173). Further, Terrell testified that had he known about all the conversations Jenkins had with Tom O'Neal, John Spencer and Mike Patterson prior to Lewis' statement implicating Melton, he likely would have wanted to bring forward this information to the jury:

> Q. (By Mr. Strand) Now, you had indicated that you had put Mr. Jenkins on in the trial in Mr. Saylor's case and also in the penalty phase, the Carter case, and you indicated what your strategy was. If you had known that Mr. Jenkins had had telephone conversations and meetings with Tom O'Neal beginning February 25th, 1991, I guess -- we have conversations on February 25th, 26th, 27th, 28th, March 1st, March 5th, March 12th, March 14th, and March 15th --all of those dates conversations Mr. Jenkins had had with Thomas O'Neal, would you have presented that information to the jury?
>
> A. If I understood it to be about this case or these cases, I should have.
>
> Q. And particularly the understanding that Mr. Lewis never gave his statement implicating Mr. Melton until March 19th?
>
> A. Exactly.
>
> Q. Now, if you would have known that Mr.

[27]Schiller did not dispute Jenkins' billing records about their meetings (T. 784).

> Jenkins had conversations with John Spencer, Mike Patterson on February 25th, with Mike Patterson on February 26th, with John Spencer, Mike Patterson on March 1st, with John Spencer on March 5th, with John Spencer on March 6th, all of these conversations prior to Mr. Lewis giving a statement implicating Mr. Melton in the -- Mr. Saylor's murder, would you have wanted that information to be brought forward to the jury?
>
> A. Likely so.
>
> Q. And what would be the reason that you would have wanted the information relative to the conversations that Mr. Jenkins with Mr. O'Neal and Mr. Spencer and Mr. Patterson, why would you have wanted the jury to know about those conversations, at least that they had happened?
>
> A. If it could establish that there were ongoing discussions that could suggest that Mr. Lewis was at risk of serious punishment and might benefit from cooperating with the State; if there was a total lack of information about Mr. Saylor's death and any alleged involvement of Mr. Melton in that incident; or any other factor that might establish a motivation for Mr. Lewis to falsely accuse Mr. Melton, those, I think, would all be serious matters that should have been presented to the trier of fact if they could be established.

(T. 180-81).

S-Ex.1 is a set of notes by Officer O'Neal (T. 51, PCR. 1560-65). These are notes that he made during interviews at the jail and with Lewis (T. 51).

Initially, Officer O'Neal did not have any suspects in the Saylor case (T. 47). He was aware of the subsequent homicide at Carter's Pawnshop (T. 47) and as a result, he spoke to Lewis, who was apprehended coming out of the pawnshop (T. 47). Officer O'Neal interviewed Lewis about other homicides, to which he

indicated he had no knowledge (T. 47-48).

After receiving information that Lewis was making comments about the pawnshop murder and also a murder involving a cabdriver (T. 49), Officer O'Neal interviewed Bruce Frazier "and a subject that was originally identified as a Summerlin, later confirmed to be a Sumler." (T. 49).[28] With regard to Summerlin, no recorded statement was taken, but the Officer did take notes (T. 51).[29] According to the notes, Lewis told Summerlin that his partner had shot the cab driver and that Lewis had admitted being there (T. 51-52). The word "Melton" was scratched out from the notes and replaced by "partner":

> Q. Okay. Now in your notes there, you have the word, looks like, Melton scratched out and the word partner wrote in there.
>
> A. Yes, sir.
>
> Q. Do you recall why that happened or how that happened?
>
> A. Because I was thinking his partner being Melton but Summerlin did not specifically say Melton, so I took it out.
>
> Q. Okay. Did he use the word partner?
>
> A. Yes, sir.

(T. 52).

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[28]During these interviews, Officer O'Neal was accompanied by Don West from FDLE, as he had been first contacted by the aforementioned people (T. 50).

[29]The interview was on February 25, 1991 (T. 53).

Officer O'Neal was of the opinion that during his deposition, Terrell had copies of his notes, which comprise S-Ex. 1 (T. 61-62). He recalled seeing Schiller handing copies of the notes to Terrell during the deposition (T. 75). However, Officer O'Neal did not know if the document with Mr. Melton's name scratched out was in the packet of notes handed to Terrell (T. 76).

Terrell believed that he first saw page one of S-Ex. 1 on the day prior to his testimony at the evidentiary hearing (T. 161, 163).[30] Terrell could have made an argument that because Melton's name was scratched out, that Lewis had indicated to Summerlin that it was someone else, not Melton (T. 264).

This note would have been relevant to Mr. Melton's defense (T. 161), in that it could have demonstrated that Lewis had created information (T. 162-63). The fact that the note was dated February 25th, and that Lewis' interview was on March 19th, was very relevant (T. 163).

Also, with this note, Terrell would have done further investigation (T. 164):

> Q. Now, if you had received this note prior to the trial in Mr. Saylor's case, would it have led you to any further investigation?
>
> A. I would expect so.

[30]Terrell did not recall seeing the note in his files on the Melton cases (T. 163-64).

Q. And what type of investigation would that be, sir?

A. Well, finding out who the individual was who had a statement from Mr. Lewis saying that his partner, allegedly not Melton, had shot the cabbie, meaning Mr. Saylor, at the minimum.

Q. And if you would have known that the individual who made that statement was incarcerated with Mr. Lewis at the Escambia County Jail when the statement was made, would you have considered that fact in forming your investigation?

A. I should.

Q. And if you would have received that note, would you have attempted to interview Mr. -- the individual who wrote that?

A. If I had the note, certainly, and if I knew who the individual was, yes.

Q. And would you have began an investigation to attempt to corroborate this individual's statement?

A. I should have.

Q. If you would have had it, sir, would you have?

A. I would think with this information, yes.

(T. 164-65). Had Lewis made similar statements to other inmates, Terrell would have presented their testimony (T. 169, 170).

On cross-examination, after further review of the O'Neal deposition, Terrell acknowledged that it appeared that he had seen the notes and was aware of Summerlin (T. 225). Ultimately, in reading back the deposition transcript, Terrell believed that O'Neal disclosed the content of these notes but did not provide the notes themselves (T. 265). Whether or not he saw the note,

Terrell should have attempted to find Sumler (T. 266).

C. FIRST SUCCESSIVE POSTCONVICTION MOTION - 2012[31]

At an evidentiary hearing on August 23, 2012, Jamel Houston explained that on August 26, 2007, his brother Tony Houston died (PCR2. 224). In the preceding year, Tony Houston had confided in Jamel that Tony had been the shooter when Mr. Saylor was killed (PCR2. 225). At one point, Tony told him that he forced Mr. Melton out of the car at gunpoint before robbing and shooting Mr. Saylor (PCR2. 227). Mr. Melton did not know what was going to happen (PCR2. 228). The shooting was a "spur of the moment" thing because Tony knew the cab driver and used to sell him drugs (PCR2. 227-8).

In fact, in 1990, when Jamel was fifteen or sixteen Jamel recalled that Houston had come home one night with blood on him (PCR2. 225). Tony acted differently than usual and had a strange look on his face (PCR2. 226). Jamel could tell that Tony was drunk because he urinated on Jamel's science project (PCR2. 226).

Tony and Bendleon Lewis talked and decided to "blame

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[31]This Court affirmed the summary denial of Mr. Melton's successive motion to vacate concerning statements made by Tony Houston about the Saylor case. Melton v. State, Florida Supreme Court Case No. SC09-2017 (Feb. 9, 2011 Order). However, Mr. Melton was permitted to develop his claim as to the motion to vacate his conviction for the first degree murder of Mr. Saylor. Mr. Melton submits that the evidence must be considered cumulatively as he could present it at a penalty phase to demonstrate that the prior violent felony aggravator does not apply.

everything on" Mr. Melton (PCR2. 228). Tony thought that the police would believe Lewis and him over Mr. Melton because they knew that Mr. Melton already had a murder charge (PCR2. 228).

The night before Tony died he spoke to Jamel on the phone (PCR2. 229). Jamel was in prison at the time but had access to a phone. Tony "had a lot of regret for what he did." (PCR2. 229). He had wanted to tell someone what he had done, but was afraid that he would be locked back up (PCR2. 229). He told Jamel that he "messed up" and Jamel could help Mr. Melton (PCR2. 229). The two prayed together and Tony apologized for what he had done (PCR2. 237). Tony said he had an innocent man doing time (PCR2. 237).

In 2006, when Tony Houston began to reveal the truth about the Saylor shooting, Jamel went to his family and tried to convince them to contact Mr. Melton's family (PCR2. 241). He was told to "leave it alone." (PCR2. 230). He decided not to jeopardize his brother going back to prison (PCR2. 242).

On December 25, 2005, Tony and his brother Manadra Houston had a conversation in which Tony revealed that he knew what it felt like to take a man's life because he had done it 20 years before (PCR2. 247). Manadra believed that Tony was referring to the Saylor shooting (PCR2. 247).

In 2004, a former cellmate of Tony Houston's from 1991, Adrian Brooks, ran into Tony. Brooks lived in Tampa but returned

to Pensacola on the weekends (PCR2. 252). The two talked and played a game of pick-up basketball (PCR2. 253). The two discussed what had led to their being locked up in 1991 (PCR2. 253). Tony told Brooks that "he felt sorry for Melton." (PCR2. 253). Tony said that he killed the taxicab driver, not Mr. Melton (PCR2. 253).

D. SECOND SUCCESSIVE POSTCONVICTION MOTION - 2014

At the most recent evidentiary hearing, Daniel Ashton and David Mack testified as to their efforts to locate and interview Lewis and what he said to them. Indeed, on June 27, 2013, Ashton and Mack traveled to Pensacola to locate and interview Lewis (PCR3. 111, 190). Ashton had met with Lewis in 2009, while Lewis was incarcerated, in relation to Mr. Melton's first successive motion to vacate (PCR3. 109-10). At that time, Lewis refused to discuss his prior testimony in Mr. Melton's cases (PCR3. 109).

Ashton and Mack found Lewis at his home; he was exiting his vehicle, returning from work (PCR3. 112, 190). They spoke to him for ten to fifteen minutes outside (PCR3. 113, 191). They asked him about the pawn shop case (PCR3. 113). Lewis was emotional, "teary" and seemed somewhat relieved to talk to them (PCR3. 123-4, 192). During the conversation, Lewis "acknowledged and stated that there was, indeed, a struggle [at the pawn shop] and during the struggle is when the weapon discharged." (PCR3. 114, 193). Lewis affirmed the previous testimony of individuals whom he had

told that a struggle occurred when the weapon discharged (PCR3. 194).

Lewis also acknowledged that there was a deal in place prior to his testimony (PCR3. 114, 194). Lewis knew what sentence he would receive, i.e. that he would plead nolo contendere to second degree murder and robbery in exchange for a twenty year sentence and not being charged with any crime related to Ricky Saylor's homicide (PCR3. 129-31). Lewis stated that he would not have testified if he did not know what assistance he was receiving (PCR3. 130).

Lewis indicated that he was willing to cooperate, including testifying because "it was the right thing to do." (PCR3. 115). Ashton and Mack intended to draft an affidavit and further question Lewis (PCR3. 117, 194). However, prior to the conclusion of the interview, Michelle Lewis, Lewis' wife, interrupted and told Lewis that he had an emergency phone call (PCR3. 114, 195). When Lewis went into the house, Ashton and Mack explained to Michelle Lewis that her husband had agreed to cooperate and they needed to further discuss the matter with him (PCR3. 118). Michelle Lewis told the investigators that she knew that her husband had "lied against Antonio Melton", through her conversations with him over the years, but, she would not allow her husband to sign an affidavit or continue to speak with the investigators and subject himself to perjury charges (PCR3. 118,

195).

After several unsuccessful attempts to speak to Lewis, again, Ashton and Mack were able to locate Lewis at is place of business on January 24, 2014 (PCR3. 120-1, 197). Lewis was cooperative, affirmed the information he had told them from the prior June and indicated that he would sign an affidavit (PCR3. 122, 200). However, after a few minutes, Lewis returned to his place of business and did not come back out (PCR3. 120, 200). In fact, the owner of the business approached Ashton and Mack and requested that they leave the property (PCR3. 121, 202).

Also, at the evidentiary hearing, Lewis acknowledged meeting with Ashton and Mack but denied admitting that a struggle occurred when the shot was fired that killed Mr. Carter (PCR3. 163-4). Lewis testified that he could not say whether a struggle occurred or not because he was trying to get out the door when the shot was fired (PCR3. 165). Lewis also denied that he knew what the State was willing to offer him if he testified against Mr. Melton (PCR3. 164).

Lewis did admit that he was nervous because he was facing the death penalty and he wanted to avoid a death sentence (PCR3. 140, 158). His attorney had told him that he could either get life in prison or the death penalty (PCR3. 141). Lewis' attorney also encouraged him to assist the State so he "wouldn't get the

death penalty." (PCR3. 142).[32] Lewis stated: "I was trying to do anything, you know, to help myself here" (PCR3. 153). In fact, Lewis admitted that he had made up a story and perjured himself in order to help himself (PCR3. 153).

Lewis also admitted that he had been threatened when he was arrested and in the custody of the Sheriff's Office (PCR3. 170). Lewis was "scared, nervous." (PCR3. 171). When asked if he had told the truth in Mr. Melton's case Lewis responded: "I don't know, maybe, maybe not. Hell, I don't know." (PCR3. 173).

Michelle Lewis confirmed that Ashton and Mack had spoken to Lewis, but she denied making any statements about her husband having lied at Mr. Melton's trial (PCR3. 209).

[32]Contrary to Jim Jenkins' previous testimony, Lewis denied that his attorney had told him that he needed to provide additional information if he wanted the State to provide any benefit (PCR3. 143, 149-50).

SUMMARY OF ARGUMENT

Recently discovered evidence, establishes that the State violated Mr. Melton's right to due process of law by presenting false and misleading testimony at Mr. Melton's capital trial. The evidence, independently and cumulatively, demonstrates that the confidence in Mr. Melton's conviction and sentence of death is undermined.

STANDARD OF REVIEW

Mr. Melton has presented several issues which involve mixed questions of law and fact. The issues regarding the application of the law present questions of law and must be reviewed *de novo*. See Sochor v. State, 883 So. 2d 766, 772 (Fla. 2004). In regard to the facts, under Porter v. McCollum, deference is given only to historical facts. All other facts must be viewed in relation to how Mr. Melton's jury would have viewed those facts. See Porter v. McCollum, 558 U.S. 30 (2009).

ARGUMENT

ARGUMENT

THE LOWER COURT ERRED IN DENYING MR. MELTON'S CLAIM THAT RECENTLY DISCOVERED EVIDENCE DEMONSTRATES THAT MR. MELTON'S CAPITAL CONVICTION AND DEATH SENTENCE ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE EVIDENCE ESTABLISHES THAT MR. MELTON'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS WERE VIOLATED, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED FALSE EVIDENCE.

A. The Evidence from Bendleon Lewis, Daniel Ashton and David Mack Qualifies as Newly Discovered Evidence as well as newly discovered evidence of a due process violation.

1. United States v. Giglio and Brady v. Maryland

In order to prove a violation of Brady v. Maryland, 373 U.S. 83 (1963), a claimant must establish that the government possessed evidence that was suppressed, that the evidence was "exculpatory" or "impeachment" and that the evidence was "material." United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995); Strickler v. Greene, 527 U.S. 263 (1999). Evidence is "material" and a new trial or sentencing is warranted "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. Kyles, 514 U.S. at 433-434; Hoffman v. State, 800 So. 2d 174 (Fla. 2001); Rogers v. State, 782 So. 2d 373 (Fla. 2001); Young v. State, 739 So. 2d 553

(Fla. 1999).

A proper materiality analysis under Brady also must contemplate the cumulative effect of all suppressed information. Further, the materiality inquiry is not a "sufficiency of the evidence" test. Kyles, 514 U.S. at 434. The burden of proof for establishing materiality is less than a preponderance. Williams v. Taylor, 529 U.S. 362 (2000); Kyles, 514 U.S. at 434. Or in other words: "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Id. Rather, the suppressed information must be evaluated in light of the effect on the prosecution's case as a whole and the "importance and specificity" of the witnesses' testimony. United States v. Scheer, 168 F.3d 445, 452-453 (11th Cir. 1999).

Furthermore, in United States v. Giglio, 405 U.S. 150, 153 (1972), the United States Supreme Court recognized that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" If the prosecutor intentionally or knowingly presents false or misleading evidence or argument in order to obtain a conviction or sentence of death, due process is violated and the conviction and/or death sentence must be set aside unless the error is harmless beyond a reasonable doubt. Kyles v. Whitley, 514 U.S. 437, 433 n.7 (1995). The prosecution has a

duty to alert the defense when a State witness gives false testimony. Napue v. Illinois, 360 U.S. 264 (1959).

The State's conduct in Mr. Melton's case violated both Giglio and Brady. At Mr. Melton's capital trial, Lewis testified:

> Q: Mr. Lewis, have you been indicted by the grand jury for the murder of George Carter and robbery of George Carter?
>
> A: Yes.
>
> Q: On January 23rd of '91?
>
> A: Yes, sir.
>
> Q: Are those charges currently pending?
>
> A; Yes, sir.
>
> Q: Have any promises been made by the State Attorney's Office, law enforcement or anyone concerning the disposition of your charges if you testify here today?
>
> A: No, sir.
>
> Q: No promises?
>
> A. No, sir.
>
> Q: Any threats been made to you?
>
> A: No.
>
> Q: Are you represented by counsel? Are you represented by a lawyer?
>
> A: Yes.
>
> Q: Does your lawyer know you're testifying here today?
>
> A: Yes, sir.

Q: What's your lawyer told you to do?

A: Just tell the truth.

(T. 624-5).[33] However, since the time Lewis testified it has become abundantly evident that Lewis was not only expecting consideration on his own charges, but knew what the consideration would entail.

Lewis told Ashton and Mack that he expected consideration and knew specifically what the consideration entailed prior to his testimony (PCR3. 114, 194). Lewis knew what sentence he would receive, i.e. that he would plead nolo contendere to second degree murder and robbery in exchange for a twenty year sentence and not being charged with any crime related to Ricky Saylor's homicide (PCR3. 129-31). Lewis told Mr. Melotn's investigators that he would not have testified if he did not know what assistance he was receiving (PCR3. 130).

Though Lewis disavowed his statements to Ashton and Mack at the evidentiary hearing, he did acknowledge that he was nervous because he was facing the death penalty and he wanted to avoid a death sentence (PCR3. 140, 158). His attorney had told him that

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[33]During cross examination, Lewis testified:

Q: You're the one that's hoping to get a deal today, aren't you?

A: **No, I'm just here to tell what happened.**

(T. 656)(emphasis added).

he could either get life in prison or the death penalty (PCR3. 141). Lewis' attorney also encouraged him to assist the State so he "wouldn't get the death penalty." (PCR3. 142). Lewis stated: "**I was trying to do anything, you know, to help myself here**" (PCR3. 153)(emphasis added).

Lewis also admitted that he had been threatened when he was arrested and in the custody of the Sheriff's Office (PCR3. 170).[34] Lewis was "scared, nervous." (PCR3. 171). When asked if he had told the truth in Mr. Melton's case Lewis responded: "I don't know, maybe, maybe not. Hell, I don't know." (PCR3. 173).

Furthermore, Lewis' statements to Ashton and Mack are corroborated by the evidence presented at the 2002 evidentiary hearing. Mr. Melton has presented evidence that Lewis told both Paul Sinkfield and Alphonso McCary that he expected to receive consideration in his case for testifying against Mr. Melton (PC-T. 458, 507). He also indicated to various individuals that he was afraid and needed advice on how to reduce his sentence (PC-T. 386, 457, 636).

Indeed, contrary to Lewis' testimony at the 2014 evidentiary hearing, his trial counsel had "some expectation" of what benefit Lewis would receive (PC-T. 291), and he communicated that to Lewis (PC-T. 292)("I told him that the only way he would avoid a

[34]Lewis' admission that he had been threatened refutes his testimony at trial that no threats had been made to him.

life sentence is if his first degree murder charge was reduced."). Lewis' trial counsel testified that he had some expectation that Lewis would receive a plea offer to second degree murder, if he cooperated with the State and that he related that to Lewis (PC-T. 291-2).

In United States v. Bagley, 473 U.S. 667, 683 (1985), the Supreme Court held:

> the possibility of a reward had been held out to [the State witnesses] . . . This possibility of a reward gave [the State witnesses] a direct, personal stake in respondent's conviction. **The fact that the stake was not guaranteed through a promise or binding contract, . . . served only to strengthen any incentive to testify falsely in order to secure a conviction.**

Id. (emphasis added). Furthermore, the Supreme Court has held: "the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and **it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend**". Napue v. Illinois, 360 U.S. 264 (1959)(emphasis added).

Here, there is no doubt that Lewis expected to receive a plea offer to second degree murder and a twenty year sentence for his assistance in Mr. Melton's case. It does not matter that the consideration was never "guaranteed".

At Mr. Melton's trial, the State also claimed that Lewis' testimony was not tainted by any "negotiations" with the State:

> Also as shown there's no deals for Mr. Lewis. Mr. Spencer very carefully developed the evidence and showed y'all that there's been no promises made to Lewis, there's no special deals, **no plea negotiations** with him. He stands on his own in this case.

(R. 795-96)(emphasis added). However, according to the evidence, most significantly, Lewis' statements to Ashton and Mack and Lewis' trial counsel's testimony, there were negotiations and communications about what Lewis expected. Thus, Lewis' testimony and the State's argument to the jury were categorically false.

Certainly the State was aware of Lewis' expectations. According to his counsel, there were discussions in which Lewis' counsel tried "to provide enough information and provide this information in an attempt to work out the best possible plea bargain for my client." (PC-T. 289). And, the trial prosecutors indicated that "[Lewis'] cooperation would be considered in resolving his case" (PC-T. 291). Therefore, negotiations occurred, information was provided and expectations were formed, even if the State did not guarantee anything (PC-T. 291).

Mr. Melton submits that due process was violated when the State mislead the jury and judge into believing that Lewis had not been promised "the possibility of a reward". Based on Lewis' statements to Ashton and Mack, the possibility of a reward appears to have been more certain, contrary to his trial testimony and the State's argument to the jury. And, even if it was not certain, that possibility, which was discussed between

Lewis' counsel and the State and relayed to Lewis "served only to strengthen any incentive to testify falsely in order to secure a conviction." See Bagley, 473 U.S. at 683.

In Mr. Melton's case, the jury and sentencing judge were deceived by the State and Lewis. Moreover, the deception was so critical that it cannot be considered harmless. The credibility battle between Mr. Melton and Lewis as to the true circumstances of the robbery and shooting was the central issue at both the guilt and penalty phases. The "possibility of a reward" was necessary to Mr. Melton's defense that the shooting was not intentional, and certainly not premeditated, and because it undercuts the entirety of Lewis' trial testimony. The State's deception prevented Mr. Melton from exposing Lewis' true motivation for testifying and establishing that the evolution of his statements was concocted to secure himself a benefit. See Davis v. Alaska, 415 U.S. 308, 315 (1974)(holding "that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.".

Had the jury discredited Lewis' testimony, they would have been left with Mr. Melton's version of how the crime occurred. As Mr. Melton testified, it was Lewis who planned the robbery, secured the weapon, assaulted Mr. Carter, and stole from the store. Mr. Melton maintained that the weapon fired during a

struggle and that he had no intention of shooting Mr. Carter. During closing arguments, Mr. Melton's counsel argued for third-degree murder and attempted to discredit Lewis' testimony (T. 821, 822-3).

At the penalty phase, the jury narrowly recommended the death sentence by an 8 - 4 vote. And, the State only established two aggravating factors. The evidence of Lewis' motivation to testify and the fact that he "was trying to do anything, you know, to help [himself] here" (PCR3. 153), would have caused the jury to discredit his testimony.

Mr. Melton, who had presented evidence in mitigation relating to his age and difficult upbringing would have been able to credibly argue that the shooting of Mr. Carter was unintentional and occurred during a struggle and did not place Mr. Melton in the category of the "worst of the worst". See Kennedy v. Louisiana, 554 U.S. 407, 420 (2008)("[W]e have explained that capital punishment must 'be limited to those offenders who commit `a narrow category of the most serious crimes' and whose extreme culpability makes them `the most deserving of execution.'' Roper, supra, at 568, 125 S.Ct. 1183 (quoting Atkins, supra, at 319, 122 S.Ct. 2242)."). Based on Lewis' recent statements, the State cannot meet its heavy burden to show that the error was harmless.

Moreover, even if this Court were to only consider Mr.

Melton's claim under the standard set forth in Brady v. Maryland, Mr. Melton must still prevail. Lewis' statements to Ashton and Mack demonstrate that he expected to receive a benefit prior to testifying. Mr. Melton was never informed of the negotiations that occurred between Lewis and the State or that Lewis expected to reduce his charge to second degree murder.

As in Bagley and Napue, the possibility of a reward was relevant and material to assessing Lewis' credibility. Had Mr. Melton known of Lewis' expectations and that he "was trying to do anything, you know, to help [himself] here" (PCR3. 153), the defense could have established that Lewis' testimony was not worthy of belief. The information also would have explained the evolution of Lewis' various statements. And, significantly, the information would have also undercut the State's evidence related to the prior violent felony aggravator as it was Lewis who placed Mr. Melton at the scene of the robbery and shooting of Mr. Saylor.

2. Newly Discovered Evidence

Mr. Melton must meet two requirements to obtain a new trial based on newly discovered evidence. First, the evidence must not have been known by the trial court, the party, or counsel at the time of the trial, and it must also appear that neither the defendant nor defense counsel could have known of such evidence by the use of due diligence. Second the newly discovered

evidence must be of a nature that it would probably produce an acquittal on retrial or yield a less severe sentence. See Jones v. State, 709 So. 2d 512, 521 (Fla. 1998). Newly discovered evidence satisfies the second prong of the test if it weakens the case against Mr. Melton so as to give rise to a reasonable doubt as to his culpability. Id. at 526.

a. Diligence.

Mr. Melton was diligent in bringing his claim. Before the lower court, the State conceded that diligence is not an issue (PCR3. 106-7).

b. The evidence would probably produce an acquittal on retrial.

At the evidentiary hearing, Lewis testified: "**I was trying to do anything, you know, to help myself here**" (PCR3. 153)(emphasis added). When asked if he had told the truth in Mr. Melton's case Lewis responded: "I don't know, maybe, maybe not. Hell, I don't know." (PCR3. 173). Indeed, according to Ashton and Mack, Lewis also "acknowledged and stated that there was, indeed, a struggle [at the pawn shop] and during the struggle is when the weapon discharged." (PCR3. 114, 193). Lewis affirmed the previous testimony of individuals whom he had told that a struggle occurred when the weapon discharged (PCR3. 194).

Lewis also acknowledged that there was a deal in place prior to his testimony (114, 194). Lewis knew what sentence he would receive, i.e. that he would plead nolo contendere to second

degree murder and robbery in exchange for a twenty year sentence and not being charged with any crime related to Ricky Saylor's homicide (PCR3. 120-1). Lewis stated that he would not have testified if he did not know what assistance he was receiving (PCR3. 130).

Michelle Lewis told the investigators that she knew that her husband had "lied against Antonio Melton", through her conversations with him over the years (PCR3. 118, 195).

Lewis has admitted that there was a struggle at the pawn shop. He specifically told Ashton and Mack that the weapon was fired during a struggle. This statement contradicts his trial testimony and also corroborates Mr. Melton's testimony about the circumstances of the shooting. Furthermore, Lewis has admitted that he expected a benefit for his testimony and that he would not have testified without expecting a plea to second degree murder and a twenty year sentence.

Ashton and Mack's testimony about Lewis' admissions, as well as the testimony of Lewis' trial counsel and the others who testified to statements he had made over the years was admissible at both the guilt and penalty phases. The evidence was impeachment of Lewis and also would have qualified as substantive evidence because the statements met an exception to the hearsay

rule – that they are against Lewis' interests.[35]

The credibility battle between Mr. Melton and Lewis as to the true circumstances of the robbery and shooting was the central issue at both the guilt and penalty phases. Had the jury discredited Lewis' testimony, they would have been left with Mr. Melton's version of how the crime occurred. As Mr. Melton testified, it was Lewis who planned the robbery, secured the weapon, assaulted Mr. Carter, and stole from the store. Mr. Melton maintained that the weapon fired during a struggle and that he had no intention of shooting Mr. Carter. During closing arguments, Mr. Melton's counsel argued for third-degree murder and attempted to discredit Lewis' testimony (T. 821, 822-3).

And, at the penalty phase, the jury narrowly recommended the death sentence by an eight (8) to four (4) vote. The State presented evidence as to only two aggravating factors[36], neither one being the weighty aggravators of heinous, atrocious or cruel or cold, calculated and premeditated. Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999)("We also note that neither the heinous, atrocious, or cruel nor the cold, calculated, and premeditated

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[35]Because hearsay is admissible during a capital penalty phase, Lewis' statements to others would have been admitted as substantive evidence at the penalty phase. See Garcia v. State, 622 So. 2d 1325, 1329 (Fla. 1993).

[36]The trial court found that Mr. Melton was previously convicted of a violent felony (first-degree murder and robbery) and that he committed the homicide for financial gain (R. 1395-6).

aggravators are present in this case. These, of course, are two of the most serious aggravators set out in the statutory sentencing scheme ...”). The evidence of Lewis’ motivation to testify and the fact that he “was trying to do anything, you know, to help [himself] here” (PCR3. 153), would have caused the jury to discredit his testimony. In addition, Lewis’ admissions that there was a struggle would have reduced Mr. Melton’s culpability, making it clear that the shooting was unintentional.

Indeed, at a minimum, Lewis’ statements would have significantly undercut the State’s pursuit of the death penalty. Mr. Melton, who had presented evidence in mitigation relating to his age and difficult upbringing would have been able to credibly argue that the shooting of Mr. Carter was unintentional and occurred during a struggle and did not place Mr. Melton in the category of the “worst of the worst”. Kennedy v. Louisiana, 554 U.S. 407, 420 (2008)(“[W]e have explained that capital punishment must ‘be limited to those offenders who commit `a narrow category of the most serious crimes' and whose extreme culpability makes them `the most deserving of execution.'’ Roper, supra, at 568, 125 S.Ct. 1183 (quoting Atkins, supra, at 319, 122 S.Ct. 2242).”).

Lewis’ statements would probably have produced a finding of a lesser included offense. And, if the jury still convicted Mr. Melton of first-degree murder, the statements would have

undoubtedly caused the jury to recommend life.

3. Cumulative Review

The lower court was required to conduct a cumulative review of Mr. Melton's case to determine whether confidence in Mr. Melton's conviction and death sentences has been undermined. See Hildwin v. State, 141 So. 3d 1178 (Fla. 2014); Swafford v. State, 120 So. 3d 760 (Fla. 2013).

a. the guilt phase

Mr. Melton has demonstrated that Lewis testified falsely at Mr. Melton's capital trial in order to secure benefits from the State. Since his conviction, Mr. Melton has presented a plethora of evidence establishing Lewis' inconsistent statements:

Paul Sinkfield testified at the evidentiary hearing in 2002 that he had a conversation with Lewis.[37] Lewis confided in him about two robberies and murders (T. 452-53).[38] As to the pawn shop murder, Lewis told Sinkfield that he got into a struggle with the owner, that Mr. Melton ran over to help and that's when the gun went off and killed the victim (PC-T. 456). During the time of this conversation, Lewis was very worried; he was facing life in prison for murder (PC-T. 457).

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[37]This conversation occurred in 1990 or 1991 (PC-T. 451-52).

[38]Sinkfield testified that this conversation took place in a private room and that to his knowledge, no one else could hear the conversation (PC-T. 460). However, Sinkfield was not always in the same cell with Lewis and didn't know who he was talking to when he was in the other cell (PC-T. 476-77).

On a subsequent occasion, Sinkfield saw Lewis in the holding cell (PC-T. 458). Lewis said he was relieved, that he had spoken to his attorney, and that he was going to get a deal (PC-T. 458).

Lance Byrd also came into contact with Lewis in the early 1990's at the Escambia County Jail (T. 485).[39] Lewis discussed the pawnshop case and was wondering if there was any way he could get out of the murder charge (PC-T. 486). Lewis said that his lawyer told him if he could come up with something else, he could probably get a lesser sentence (PC-T. 487).[40]

Next, Alphonso McCary testified to his conversation with Lewis in the Escambia County Jail. McCary had been in a cell with Mr. Melton, during which time Mr. Melton told him that Lewis was trying to put a murder charge on him (PC-T. 507). When McCary asked Lewis about this, Lewis said that they came to him with a deal and he was trying to protect himself (PC-T. 507).[41] However, Lewis, who seemed to be upset about what he was doing to Mr. Melton, said that after this was all over with, he would straighten out what he had done wrong (PC-T. 507-08).

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[39] Byrd also knew Lewis prior to their contact in the jail (T. 485).

[40]Byrd's testimony is corroborated by Lewis' attorney's testimony that he told Lewis that his cooperation in the pawn shop case alone would probably not be sufficient, but that if he had any information on any other crimes, he might want to come forward (PC-T. 285-86).

[41]McCary was friends with both Lewis and Mr. Melton and had known them for many years before 1991 (PC-T. 516-17).

McCary later saw Lewis years later at Century Correctional Institution (PC-T. 509). Lewis again reiterated that he would help Mr. Melton when he got out (PC-T. 509).

Fred Harris was also incarcerated in the Escambia County Jail in 1990 and 1991 (PC-T. 632-33). Lewis, who was a friend of his (PC-T. 633), told him that in the pawn shop case, he, Mr. Melton and the victim were wrestling, the gun went off, and the owner was shot (PC-T. 635). Lewis was scared and needed some advice from Harris (PC-T. 636). In response, Harris told him that he needed to do what he had to in order to save himself (PC-T. 636). Lewis responded that he was going to state that Mr. Melton was the triggerman in the pawn shop case (PC-T. 636).[42]

Furthermore, as to the "circumstances" of the offense Lewis' undisclosed PSI indicates that, contrary to Lewis' testimony, there was a struggle in the pawn shop. See Def. Ex. 7 ("After Mr. Carter opened the safe he apparently began struggling with Melton. Melton and Lewis then struck the victim knocking him to the floor.").

In addition, Lewis' counsel testified in 2002 that he negotiated with the State on Lewis' behalf in order "to provide enough information and provide this information in an attempt to work out the best possible plea bargain for my client." (PC-T.

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[42]Lewis stated that the pawn shop owner was holding the gun when it went off (T. 647).

289). And, the trial prosecutors indicated that "[Lewis'] cooperation would be considered in resolving his case" (PC-T. 291). Therefore, negotiations occurred, information was provided and expectations were formed. (PC-T. 291).

Based on the evidence, it is clear that Lewis expected to be rewarded for his testimony against Mr. Melton. In addition, Lewis has admitted that "[he] was trying to do anything, you know, to help [himself] here" (PCR3. 153). From the inception of the case, Lewis' statements evolved. He admitted that he lied in his statement to law enforcement; he admitted he lied in his July 16, 1991 deposition. And, at the recent evidentiary hearing he admitted that he may not have told the truth throughout the prosecution of Mr. Melton (PCR3. 173). The statements to individuals in the jail demonstrate that Lewis was not being honest and attempted to shift the blame to Mr. Melton in order to avoid a death sentence.

Lewis' statements to Ashton and Mack, in and of themselves, are compelling and would have assisted Mr. Melton's defense. And, when combined with the previously presented evidence from Lewis' confidants and Mr. Melton's testimony, there can be no doubt that the Mr. Melton is entitled to a new trial.

b. the penalty phase

During the penalty phase proceedings, the State utilized the Saylor conviction to secure a death sentence against Mr. Melton.

The jury recommended death by a vote of eight (8) to four (4) (R. 1112, 1285). On May 19, 1992, the trial court imposed a sentence of death for the murder and life imprisonment on the armed robbery (R. 1380-1401, 1413-22).

In its sentencing order, the trial court relied on two aggravating circumstances, pecuniary gain and the prior violent felony from the Saylor case (R. 1394-95). Regarding the aggravating factor of a prior violent felony, the trial court found:

> 1. The defendant was previously convicted of another capital felony and of a felony involving the use or threat of violence to the person. The evidence established conclusively and beyond any reasonable doubt that the defendant was previously convicted of first degree murder and armed robbery. In that case, as in this case, the victim was killed by a shot to the head while the defendant was participating in the robbery of the victim. In both cases, the evidence established that the defendant fired the fatal shots. The violent crimes of which defendant were convicted were extremely violent and life-threatening, and resulted in the death of the victim. They were committed with no pretense of moral justification, for pecuniary gain, and with disregard to the life of the victim. The Court gives great weight to this aggravating circumstance.

(R. 1395).

While addressing the issue of mitigating circumstances, the court gave no weight to the defense's argument of disparate treatment of co-defendants, the defendant's domination by co-defendant Lewis, or that the death of Mr. Carter occurred under accidental circumstances:

3. Lenient treatment or disparate sentences, actual and inchoate, given two co-defendants. The Court finds that no mitigating circumstance in this regard was proved by the greater weight of the evidence. Co-defendant Bendleon Lewis has not been sentenced in this case. There can be little doubt that Bendleon Lewis expects and will receive some degree of leniency (certainly less than a death sentence) for his cooperation, and considering the fact that the evidence conclusively establishes the defendant, and not Bendleon Lewis, as the trigger man who committed the actual killing in this case. There are legitimate reasons for imposition of a lesser sentence on Bendleon Lewis, and such lesser sentence would not be disparate or constitute a mitigating circumstance.

Not charging or prosecuting Bendleon Lewis in the death of Ricky Saylor is not lenient treatment and does not constitute a mitigating circumstance. The greater weight of the evidence proves that the State does not have sufficient valid evidence to do so; nor does failure of the State to prosecute Bendleon Lewis for perjury. Sentencing of co-defendant Tony Houston in the prior case to twenty years imprisonment is not lenient or disparate treatment in <u>that</u> case, and would not be a mitigating circumstance in <u>this</u> case if it were. Again, in the prior case, Antonio Melton was proved to be the trigger man, not co-defendant Tony Houston, and legitimate reasons existed for differing sentences.

4. Defendant’s domination by co-defendant, Bendleon Lewis. This circumstance is not proved by the greater weight of the evidence, and has only the defendant’s testimony to support it. The evidence is clear that the defendant voluntarily participated in this robbery and in fact armed himself with a firearm which he personally carried into the store to facilitate the robbery. There is no doubt from the evidence that he acted of his own volition and as a willing participant in the robbery. Defendant did not act under the substantial domination of any other person.

5. The death of Mr. Carter occurring under accidental circumstances. This circumstance was not proved by the greater weight of the evidence. It is supported only by the defendant’s testimony and is

> inconsistent with most of the other evidence in this case. Mr. Carter had every right to resist, but the reliable evidence indicates that he did not do so – only the defendant's testimony. It is difficult to believe that, in a struggle, the victim was "accidentally" shot in the exact spot in the head that would produce immediate death. In the trial phase of the case, the jury had a reasonable doubt as to whether the killing was premeditated. However, in the penalty phase of the trial, it is evident that the jury rejected any contention that the shooting was "accidental" in recommending death by an eight to four vote.

(R. 1397-99)(emphasis in original).

The recently disclosed statements of Lewis undermine the trial court's sentencing order and establish substantial mitigation. Mr. Melton has always maintained that Mr. Carter's gun went off during a struggle for control of the weapon (R. 691-95), and that he had no intent to shoot Mr. Carter. Lewis' statements to Ashton and Mack corroborate Mr. Melton's version of the events and establish mitigation.

Obviously, Lewis' credibility as to the circumstances of the crime was central to the issue of what aggravtors could be established and whether Mr. Melton's mitigation would be accepted as true. Thus, it was also critical that the information about what Lewis expected to receive in exchange for his testimony be disclosed to Mr. Melton's trial counsel.

Had the jury heard Lewis' recently disclosed statements about the struggle for the weapon and known about his expectation to receive a benefit, it is much more likely that two additional

jurors would have voted for life.

Furthermore, the recently disclosed statements must be evaluated cumulatively with all of the previously presented evidence that diluted the aggravation and established mitigation.

This evidence includes Lewis and Houston's statements to witnesses concerning the fact that Mr. Melton was not present for the shooting of Mr. Saylor. At Mr. Melton's initial evidentiary hearing David Sumler testified that he came into contact with Lewis in 1991 (PC-T. 420).[43] During a conversation, Lewis stated that he and Houston shot a taxi driver and that Mr. Melton wasn't there at the time (PC-T. 420).[44] According to Sumler, Lewis was bragging in the cell, which contained 24 other inmates (PC-T. 435). Everyone in the cell knew what Lewis was doing (PC-T. 433).

Subsequently, someone from law enforcement came to see Sumler (PC-T. 430).[45] He was asked whether Lewis had said anything about Mr. Melton being at the scene where the taxi driver got shot (PC-T. 430). Sumler related the same information

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[43]Sumler testified that he has known Ben Lewis, Tony Houston and Antonio Melton since they were little children in the neighborhood (PC-T. 437).

[44]Lewis did not specifically say who shot the taxicab driver, only that Mr. Melton was not there and he and Houston were (PC-T. 435).

[45]The witness did not recall who it was specifically that came to see him or how they got his name (PC-T. 430).

(PC-T. 430). To his knowledge the officer who interviewed him was obtaining information to present to the courts on Mr. Melton's behalf (PC-T. 439). However, this information was never provided to Mr. Melton's trial counsel.

In addition, Paul Sinkfield testified at the evidentiary hearing in 2002, that he had a conversation with Lewis.[46] Lewis confided in him about two robberies and murders (PC-T. 452-53).[47] Lewis stated that he robbed and killed a cab driver with T.H. [Tony Houston] (PC-T. 453).[48] Lewis said he himself shot the cab driver because "he was just nervous, got excited and shot him" (PC-T. 454).

Lance Byrd also came into contact with Lewis in the early 1990's at the Escambia County Jail (PC-T. 485).[49] Lewis discussed the pawnshop case and was wondering if there was any way he could get out of the murder charge (PC-T. 486). Lewis said that his lawyer told him if he could come up with something else, he could probably get a lesser sentence (PC-T. 487).

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[46]This conversation occurred in 1990 or 1991 (PC-T. 451-52).

[47]Sinkfield testified that this conversation took place in a private room and that to his knowledge, no one else could hear the conversation (PC-T. 460). However, Sinkfield was not always in the same cell with Lewis and didn't know who he was talking to when he was in the other cell (PC-T. 476-77).

[48]Lewis mentioned that he was with Mr. Melton earlier in the day (PC-T. 454).

[49] Byrd also knew Lewis prior to their contact in the jail (PC-T. 485).

Lewis said he knew about the taxicab murder (PC-T. 488), and that he was going to tell his lawyer that Mr. Melton had done it (PC-T. 488, 499). Lewis didn't say who did kill the taxicab driver (PC-T. 499), but he did admit that Mr. Melton had left and that he and Houston were still there (PC-T. 488, 500). While Lewis told the witness this information in private, Byrd didn't know what Lewis told other people (PC-T. 503).

Alphonso McCary also testified to his conversation with Lewis in the Escambia County Jail. McCary had been in a cell with Mr. Melton, during which time Mr. Melton told him that Lewis was trying to put a murder charge on him (PC-T. 507). When McCary asked Lewis about this, Lewis said that they came to him with a deal and he was trying to protect himself (PC-T. 507).[50] However, Lewis, who seemed to be upset about what he was doing to Mr. Melton, said that after this was all over with, he would straighten out what he had done wrong (PC-T. 507-08).

Lewis proceeded to state that Mr. Melton didn't know anything about the cab murder, but that he was trying to save himself now and it was better Antonio than him (PC-T. 508).

Bruce Crutchfield was also incarcerated in the Escambia County Jail in early 1991 when he came into contact with Lewis. Lewis was hysterical, having a hard time coping with the reality

[50]McCary was friends with both Lewis and Mr. Melton and had known them for many years before 1991 (PC-T. 516-17).

of the situation and was in total agony (PC-T. 592). Lewis confessed that he had shot a taxi driver and couldn't believe what he had done (PC-T. 592).[51] Crutchfield told him to keep his mouth shut, that if he needed to confess, he should confess to God (PC-T. 592-93).[52] Crutchfield remembered this conversation because "when somebody walks up to you and tells you that they done something like that and they are sitting there beating their head on the wall and they are sitting there and you're talking to them, you don't forget it." (PC-T. 622).[53]

At his 2012 evidentiary hearing, Mr. Melton presented evidence regarding Tony Houston's postconviction statements relating to the Saylor shooting. At the evidentiary hearing, Mr. Melton presented evidence that in 2006, Tony Houston confided in his brother, Jamel Houston, that Tony had been the shooter when Mr. Saylor was killed (PCR2. 225). At one point, Tony told him that he forced Mr. Melton out of the car at gunpoint before robbing and shooting Mr. Saylor (PCR2. 227). Mr. Melton did not know what was going to happen (PCR2. 228). The shooting was a

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[51]Lewis said he was by himself when he killed the cab driver (PC-T. 593).

[52]In fact, however, Lewis confessed to a lot of different people in the cell (PC-T. 625-26).

[53]Crutchfield didn't tell on Lewis because that would make him a snitch (PC-T. 616). He testified at the evidentiary hearing because he believed an innocent man was going to die for what someone else did (PC-T. 623).

"spur of the moment" thing because Tony knew the cab driver and used to sell him drugs (PCR2. 227-8).

And, Jamel recalled that in 1990, when he was fifteen or sixteen, Tony Houston had come home one night with blood on him (PCR2. 225). Tony acted differently than usual and had a strange look on his face (PCR2. 226). Jamel could tell that Tony was drunk because he urinated on Jamel's science project (PCR2. 226).

Tony Houston revealed to his brother that he and Bendleon Lewis talked and decided to "blame everything on" Antonio (PCR2. 228). Tony thought that the police would believe Lewis and him over Mr. Melton because they knew that Mr. Melton already had a murder charge (PCR2. 228).

The night before Tony died in August, 2007, he spoke to Jamel on the phone (PCR2. 229). Jamel was in prison at the time but had access to a phone. Tony "had a lot of regret for what he did." (PCR2. 229). He had wanted to tell someone what he had done, but was afraid that he would be locked back up (PCR2. 229). He told Jamel that he "messed up" and Jamel could help Mr. Melton (PCR2. 229). The two prayed together and Tony apologized for what he had done (PCR2. 237). Tony said he had an innocent man doing time (PCR2. 237).

On December 25, 2005, Tony and his brother Manadra Houston had a conversation in which Tony revealed that he knew what it felt like to take a man's life because he had done it 20 years

before (PCR2. 247). Manadra believed that Tony was referring to the Saylor shooting (PCR2. 247).

And, unbeknownst to Mr. Melton, in 2004, a former cellmate of Tony Houston's from 1991, Adrian Brooks, ran into Tony. Brooks lived in Tampa but returned to Pensacola on the weekends (PCR2. 252). The two talked and played a game of pick-up basketball (PCR2. 253). The two discussed what had led to their being locked up in 1991 (PCR2. 253). Tony told Brooks that "he felt sorry for Melton." (PCR2. 253).

Lewis and Houston's statements establish that Mr. Melton was not present when Mr. Saylor was shot. The evidence substantially weakens the aggravator concerning the sole prior violent felony that the jury was instructed to consider in determining whether Mr. Melton lived or died. There is no doubt that the jury would have disregarded, or assigned no weight to the aggravator if it knew that both Lewis and Houston admitted that Mr. Melton was not involved in shooting Mr. Saylor.

And, in addition to the evidence undermining the prior violent felony aggravator, Mr. Melton has previously established a wealth of mitigating evidence that the jury did not have the opportunity to hear. The jury never heard Mr. Melton's mitigation which included: Frankie Stoutemire, Sr., Antonio Melton's father, testified that he was in the service when Antonio was raised (PC-T. 558). While Stoutemire would have

visits with Antonio (PC-T. 559-60), Antonio's mother was living with David Booker at the time (PC-T. 560).[54] It seemed that every time Stoutemire came home to see his son, Antonio's mother would get repercussions from Booker (PC-T. 561).

Stoutemire had heard that Booker was abusing Antonio's mother (PC-T. 560).[55] This led to a confrontation with Booker. Stoutemire told him that "if he ever touched my son, it was going to be me and him out on the street." (PC-T. 560).

Stoutemire recalled a conversation where Antonio told him he was out of school and couldn't get a real job (PC-T. 563). Stoutemire advised him to join the service and get out of town (PC-T. 563). Antonio shook his head and that was the last time Stoutemire saw him (PC-T. 563). According to Stoutemire, the religion that Antonio's mom believed in did not agree with going into the military (PC-T. 563). Antonio's mom had raised him, so Stoutemire backed off (PC-T. 563). Stoutemire lamented that Antonio didn't have any guidance his whole life (PC-T. 564).

Latricia Davis, Mr. Melton's mother, testified that the family had lived in subsidized housing called Truman Arms (PC-T. 661-62), which was a rough, bad place (PC-T. 662). Davis was strict with Antonio because she didn't want him turning out like a lot of the young people that she was seeing around (PC-T. 663).

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[54]They lived in the projects (T. 562).

[55]He also knew that Booker was a heroine addict (T. 561).

She did what she could being a single, working parent (PC-T. 663). Davis had been married to David Booker, who had a drug problem (PC-T. 666). This caused many problems at home, and Booker was verbally and physically abusive (PC-T. 667).

Later on during Antonio's youth, Davis became active in the Jehovah's Witness Church (PC-T. 669). She tried to get Antonio to live that type of lifestyle, because she thought it was best for him (PC-T. 669). This involved keeping him away from school activities (PC-T. 670).

Finally, Davis took Antonio out of school when he was 16 years old because of the bad associations that he was exposed to (PC-T. 664). Lewis was one of the people that Davis didn't want her son hanging around with at school (PC-T. 666). Antonio looked up to these kids because he was sheltered and they had so much street knowledge (PC-T. 664). Lewis, for example, seemed so much wiser and street smart (PC-T. 666).

When Antonio was 16, Davis got married and moved to Mobile, Alabama (PC-T. 663). Antonio stayed with his grandmother and aunt in Pensacola, Florida (PC-T. 665).

Margaret Parker, Mr. Melton's aunt, also testified that Mr. Melton would sometimes stay with her after he was 16 years old (PC-T. 746). Parker noted that after Antonio's mom moved, he was out more often (PC-T. 748). According to Parker, Antonio was less mature than other children his age (PC-T. 752), and he

trusted other kids (PC-T. 753). Parker observed that in regard to Antonio, Lewis, and Houston, it was Houston who seemed to be the leader of the group, then Lewis (PC-T. 749).[56]

Dr. Henry Dee, a clinical psychologist with a subspecialty in clinical neuropsychology (PC-T. 367), conducted a neuropsychological evaluation and extensive interview with Mr. Melton (PC-T. 370). According to Dr. Dee, Mr. Melton was very open and seemed to be genuinely remorseful (PC-T. 379).[57]

And, while Mr. Melton didn't have any brain damage, Dr. Dee did find evidence of other mitigation (PC-T. 372). Mr. Melton had an unusual childhood (PC-T. 373). He was in a sense overprotected (PC-T. 373). Dr. Dee explained that Mr. Melton's mother was a Jehovah's witness and she involved him in this religion (PC-T. 373). While Mr. Melton had been a gifted athlete when he was younger, his mother forced him to give it up and be more and more involved in intensive Bible study (PC-T. 373). Also, she withdrew him from athletics in part because she didn't care for the influence of peers (PC-T. 374). By the time he reached middle adolescence, Mr. Melton was fairly isolated from

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[56]Lewis and Houston were both older than Antonio (PC-T. 749).

[57]Mr. Melton denied any involvement in the Saylor case (PC-T. 379).

his peers (PC-T. 374).[58]

With regard to emotional maturity, Mr. Melton was a strikingly immature boy for 18 (PC-T. 381). By the time he entered high school, he had almost no social contact (PC-T. 381). Dr. Dee felt that Mr. Melton could be easily manipulated (PC-T. 383).[59] That's why his mother didn't want him around the locker room and withdrew him from football (PC-T. 383).

According to Dr. Dee's evaluation, Mr. Melton went from a situation of being isolated and/or in the church to being with a bunch of criminals by the time he got to high school (PC-T. 374). Mr. Melton immediately fell in with these people (PC-T. 374). He began to skip school, use drugs, and talk back (PC-T. 374).

As a result of this, Davis withdrew her son from school at age 16 (PC-T. 374). She gave him a choice of either conforming to everything she believed in or to move out (PC-T. 375). From then until the time he was arrested, Mr. Melton would sometimes be with his grandmother or aunt (PC-T. 375). During the two years prior to his arrest, Mr. Melton had essentially no supervision (PC-T. 378).

Dr. Dee commented that Mr. Melton's stepfather was a very

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[58]Dr. Dee explained that Davis worked a lot to support Mr. Melton and his brother (PC-T. 373). Thus, from a fairly young age, Antonio was taking care of his brother after school (PC-T. 373).

[59]Mr. Melton viewed Lewis and Houston as more sophisticated than himself (PC-T. 383).

harsh man (PC-T. 375). He was abusive towards Davis in front of Antonio (PC-T. 376), to the point where he broke her arm (PC-T. 376). Mr. Melton's stepfather used heroin and would bring other women into the house in front of him (PC-T. 376). It was frankly grossly immoral conduct and probably shocking to a young child (PC-T. 376).

Dr. Dee testified that Mr. Melton's father did not have much contact with him (PC-T. 376). He went into the Service for about three years at the time Mr. Melton was born (PC-T. 376). He injured his back badly and had to have a series of operations (PC-T. 376-77). By the time he returned, his son was already an adolescent and living with his grandmother (PC-T. 377). Unfortunately, Mr. Melton's only male role model was an abusive heroin addict (PC-T. 377).

In assessing the cumulative value of the evidence Mr. Melton has presented, there can be no doubt that the mitigation evidence, including Lewis' recently disclosed statements about the circumstances of the offense, combined with the evidence negating the prior first degree murder conviction, would have caused the jury to recommend a life sentence and the trial court would have been compelled to sentence Mr. Melton to life.

B. The lower court erroneously analyzed Mr. Melton's claim.

Initially, the lower court determined that Mr. Melton could not prevail on his claim because Lewis did not recant his trial

testimony at the evidentiary hearing (PCR3. 427). The lower court cited to Armstrong v. State 642 So. 2d 730 (Fla. 1994), in support of its conclusion. However, Armstrong is inapplicable to the circumstances here. Armstrong concerned recanted testimony that occurred shortly after a witness' trial testimony. Thus, the this Court addressed the issue of recanted testimony on direct appeal. Here, Mr. Melton raised his claim of newly discovered evidence in postconviction.

Further, as Mr. Melton made clear at his evidentiary hearing, his claim did not concern a "recantation", but additional inconsistent statements made by Lewis; statements that are corroborated by numerous witnesses, including, Daniel Ashton, David Mack, Fred Harris, Alphonso McCary, Paul Sinkfield and Jim Jenkins.

Thus, contrary to the lower court's analysis, Mr. Melton was not required to present a "recantation" by Lewis in order to prevail. Rather, he was required to demonstrate that the evidence establishes that Lewis' numerous inconsistent statements cause his trial testimony to be unbelievable and undermines confidence in the outcome.[60]

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[60]The lower court did not address Mr. Melton's argument that in assessing Mr. Melton's claim under the prejudice standard related to his constitutional claims that due process violations occurred as well as ineffective assistance of counsel. Instead, the lower court erroneously employed the standard set forth in Jones v. State, 709 So. 2d 512, 521 (Fla. 1998). However, this is clearly contrary to this Court's analysis in Hildwin v. State,

Indeed, Mr. Melton need not prove that Lewis' trial testimony is "recanted" or false[61], but that it is unworthy of belief. The lower court's analysis discounts the value of establishing numerous inconsistent statements, including inconsistent statements that are consistent with one another and contrary to Lewis' trial testimony. Here, Mr. Melton could present numerous credible witness – witnesses who have nothing to gain and made consistent statements throughout Mr. Melton's litigation and have never committed perjury – to testify about Lewis' inconsistent statements that conflict and undermine his trial testimony.

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141 So. 3d 1178 (Fla. 2014); Swafford v. State, 120 So. 3d 760 (Fla. 2013); Smith v. State, 75 So. 3d 2005 (Fla. 2011); Johnson v. State, 44 So. 3d 51 (Fla. 2010); Rivera v. State, 995 So. 2d 191 (Fla. 2008); and Lightbourne v. State, 742 So. 2d 238 (Fla. 1999). Mr. Melton presented evidence of due process violations and ineffective assistance of counsel during his initial Rule 3.851 proceedings. In addition, in his current successive Rule 3.851 proceedings, Mr. Melton presented a claim that the State violated his right to due process by failing to reveal its negotiations with Lewis.

[61]The lower court's finding that Lewis' testimony at the hearing is credible fails to consider the fact that Lewis lied to law enforcement during his initial statement, lied under oath at his initial deposition (though the State extended him the benefit of not charging him with perjury), and made repeated inconsistent statements over a period of several years to numerous individuals. In addition, the lower court overlooks the fact that Lewis' testimony at the evidentiary hearing conflicted with his trial attorney's previous testimony. Finally, at the evidentiary hearing, Lewis could not remember significant details and the lower court remarked that Lewis was not credible. Therefore, the lower court's finding is not supported by competent or substantial evidence.

Further, by myopically analyzing Mr. Melton's claim, the lower court concluded that Mr. Melton is only left with hearsay evidence. (PCR3. 428). Such an analysis overlooks the fact that Mr. Melton could have presented impeachment evidence of Lewis. The evidence was clearly admissible and would have undermined Lewis' credibility. Indeed, the jury could have heard from professionals (Ashton, Mack, Jenkins) as well as Lewis' jailhouse confidants (Sinkfield, Harris, McCary). There can be no doubt that in light of the numerous, credible witnesses, the jury would have disregarded Lewis' testimony and would have accepted Mr. Melton's testimony and argument concerning third-degree murder.

Moreover, as to the analysis of how the new evidence would have effected the verdict in the penalty phase, the lower court discounted the fact that the jury recommendation was only eight (8) to four (4), and Mr. Melton's mitigation and attack on the prior violent felony must be considered cumulatively. See, Hildwin v. State, 141 So. 3d 1178 (Fla. 2014); Swafford v. State, 120 So. 3d 760 (Fla. 2013). Indeed, the lower court erroneously relies on the sentencing order entered in 1992 – years before Mr. Melton presented the evidence that undermines confidence in his sentence. See PCR3. 428. Thus, while in 1992 Mr. Melton may have not been able to prove that the shooting was accidental, the court failed to consider that finding in light of the plethora of evidence that has been presented in postconviction that

establishes that it was accidental and that Lewis was not truthful when he testified. And, the lower court also failed to consider the evidence that Mr. Melton has presented relating to the prior violent felony aggravator.

As to Mr. Melton's claim that due process was violated, the lower court overlooks Lewis' testimony at the evidentiary hearing in which he confessed that, at the time of Mr. Melton's trial: "[he] was trying to do anything, you know, to help [himelf] here" (PCR3. 153). In fact, Lewis admitted that he had made up a story and perjured himself in order to help himself (PCR3. 153).

Lewis also admitted that he had been threatened when he was arrested and in the custody of the Sheriff's Office (PCR3. 170). Lewis was "scared, nervous." (PCR3. 171). When asked if he had told the truth in Mr. Melton's case Lewis responded: "I don't know, maybe, maybe not. Hell, I don't know." (PCR3. 173). Clearly, Lewis admitted that he had been threatened and that he expected assistance from the State. However, the lower court discounted United States Supreme Court law which makes clear that Mr. Melton was entitled to be fully advised as to Lewis' expectations and his negotiations with the State in order to effective cross-examine Lewis.[62]

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[62]Again, contrary to the lower court's analysis, Mr. Melton need not establish that a deal had been made. In United States v. Bagley, 473 U.S. 667, 683 (1985), the Supreme Court held:

the possibility of a reward had been held out to [the

Furthermore, Mr. Melton has presented competent and substantial evidence that there was much more to the negotiations between Lewis and the State than Mr. Melton ever knew. In 2002, Lewis' attorney, who was found credible, testified he had "some expectation" of what benefit Lewis would receive (PC-T. 291), and he communicated that to Lewis (PC-T. 292)("I told him that the only way he would avoid a life sentence is if his first degree murder charge was reduced."). Lewis' trial counsel also testified that he had some expectation that Lewis would receive a plea offer to second degree murder, if he cooperated with the State and that he related that to Lewis (PC-T. 291-2). Therefore, the lower court's determination that there was no competent evidence concerning the negotiations of a plea agreement, other than hearsay, is not supported by the record. See PCR3. 429.

Finally, as to the cumulative review of Mr. Melton's

> State witnesses] . . . This possibility of a reward gave [the State witnesses] a direct, personal stake in respondent's conviction. **The fact that the stake was not guaranteed through a promise or binding contract, . . . served only to strengthen any incentive to testify falsely in order to secure a conviction.**

Id. (emphasis added). Furthermore, the Supreme Court has held: "the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and **it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend**". Napue v. Illinois, 360 U.S. 264 (1959)(emphasis added). The lower court overlooked the Bagley and Napue opinions in denying Mr. Melton's claim.

evidence, the lower court did not correctly analyze the evidence. See PCR3. 430. Successive postconviction defendants have been able to overcome findings that constitutional violations had not been established by presenting additional evidence. See State v. Mills, 788 So. 2d 249 (Fla. 2001)[63], see also, Hildwin v. State, 141 So. 3d 1178 (Fla. 2014); Swafford v. State, 120 So. 3d 760 (Fla. 2013). Indeed, in the case of Juan Melendez, evidence that initially was found not credible was later found to be credible by the Honorable Barbara Fleischer, Circuit Court Judge Hillsborough County, when Mr. Melendez presented additional evidence corroborating it. Mr. Melendez' conviction was vacated and he was released from prison in January, 2002.[64]

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[63]Greg Mills, like Mr. Melton claimed that his conviction and sentence should be vacated based on evidence relating to his culpability for the crime he committed. As a successor, and under an active death warrant, Mills filed an affidavit of his co-defendant, Ashley, that was inconsistent with his trial testimony. Ashley refused to testify at the evidentiary hearing, but the parties stipulated that he would testify consistent with his affidavit. See, Mills v. State, 786 So. 2d 547 (Fla. 2001). This Court affirmed the denial of relief. However, shortly thereafter, Mills presented the testimony of Ashley's cell mate, Anderson, who testified as to an inconsistent statement of Ashley. See State v. Mills, 788 So. 2d 249 (Fla. 2001). It was only after this testimony, which was largely consistent with evidence presented before it, that the lower court held that Mills was entitled to relief. This Court affirmed. Id. Clearly, there was a tipping point which caused similar evidence, indeed evidence that had been previously discounted or dismissed, to combine to require relief. Mr. Melton has met this tipping point.

[64]See Melendez v. State, 718 So. 2d 746 (Fla. 1998). Judge Fleischer's Order was not appealed and is in available from the Polk County Clerk of Court, Case No. CF84-1016A2-XX.

Here, the credibility battle between Mr. Melton and Lewis as to the true circumstances of the robbery and shooting was the central issue at both the guilt and penalty phases. Had the jury discredited Lewis' testimony, they would have been left with Mr. Melton's version of how the crime occurred. As Mr. Melton testified, it was Lewis who planned the robbery, secured the weapon, assaulted Mr. Carter, and stole from the store. Mr. Melton maintained that the weapon fired during a struggle and that he had no intention of shooting Mr. Carter. During closing arguments, Mr. Melton's counsel argued for third-degree murder and attempted to discredit Lewis' testimony (T. 821, 822-3).

And, at the penalty phase, the jury narrowly recommended the death sentence by an eight (8) to four (4) vote. The State presented evidence as to only two aggravating factors.[65] The evidence presented throughout Mr. Melton's postconviction proceedings was critical to establish the appropriateness of a life sentence.

[65]The trial court found that Mr. Melton was previously convicted of a violent felony (first-degree murder and robbery) and that he committed the homicide for financial gain (R. 1395-6).

CONCLUSION

Since his arrest on January 23, 1991, Bendleon Lewis has consistently confided to others that Mr. Carter was shot during a struggle in which the gun went off. He has also made clear that he "was trying to do anything ... to help [himself]." (PCR3. 153). What Lewis did was falsely testify to the circumstances of what occurred in Mr. Carter's pawn shop and when he exited Mr. Saylor's cab. The State was well aware that Lewis "was trying to do anything ... to help [himself]" (PCR3. 153), and rewarded his false testimony against Mr. Melton by not charging him with any crime in the death of Ricky Saylor; not charging him with the perjury he committed during his deposition; and allowing him to plead to second degree murder for the death of George Carter. The jury never knew Lewis' true expectations for his testimony against Mr. Melton or the fact that it was not until he met with prosecutors pursuant to a John Doe subpoena that he implicated Mr. Melton in the Saylor case concocted his story about what occurred in the Carter case. Based on what is now known about Lewis' consistently inconsistent statements and admissions that he falsely testified and his expectations, Mr. Melton is entitled to a new trial, or at the very least, a new penalty phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by electronic service to Charmaine Millsaps, Office of the Attorney General, 400 South Monroe Street, PL-01, Tallahassee, FL 32399-6536 this 7th day of July, 2015.

CERTIFICATE OF FONT

This is to certify that the Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

/s/. Linda McDermott
LINDA McDERMOTT
Florida Bar No. 0102857
McClain & McDermott, P.A.
20301 Grande Oak Blvd.
Suite 118-61
Estero, FL 333928
(850) 322-2172
F (954) 564-5412
lindammcdermott@msn.com

Counsel for Mr. Melton